In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 151

LOUIS ZWICK, ET AL., PETITIONERS

v.

ORVILLE L. FREEMAN, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 14–26) is reported at 373 F. 2d 110.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1967. The petition for a writ of certiorari was filed on May 11, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below properly ruled that bankrupts may be subjected to the employment restrictions

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of Section 8(b) of the Perishable Agricultural Commodities Act.

STATUTES INVOLVED

Section 2 of the Perishable Agricultural Commodities Act, as amended, 7 U.S.C. 499b, provides in pertinent part:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce——
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> * * * * *
>
> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction;
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> * * * * *

Section 8(b) of the Perishable Agricultural Commodities Act, as amended, 7 U.S.C. 499h(b), provides in pertinent part:

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of his title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes

> in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section.

Section 17 of the Bankruptcy Act, 11 U.S.C. 35, provides in pertinent part:

> (a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part * * *.

STATEMENT OF THE CASE

The relevant facts are not in dispute (Pet. App. 15–16). Petitioners were partners in a wholesale fruit and vegetable business in New York (Pet. App. 16) which had since August 1947 been licensed under the Perishable Agricultural Commodities Act as a commission merchant and dealer (Pet. App. 16).

Between June and August 1964 petitioners received 20 lots of fruits and vegetables from five shippers on a joint account basis, sold them, but failed to pay the shippers. Between January 1961 and September 1964 petitioners purchased and received 140 lots of perishable agricultural commodities from 22 shippers but failed to pay for them, although some installment

payments were made upon purchases made prior to 1964. Also during 1963 and 1964, petitioners engaged various brokers to negotiate purchases on their behalf, three of whom were not paid their brokerage fees. In all, petitioners failed to pay sums due upon 295 transactions covered by the Commodities Act and owed a total of $254,394.55 on such transactions (Pet. App. 16).

On September 25, 1964, the partnership filed a petition in bankruptcy under Chapter XI and submitted a plan of arrangement by which it offered to pay creditors 30 per cent of their claims. The schedules filed in the bankruptcy proceedings listed all of the creditors in the 295 transactions described above. This plan was approved and confirmed on February 25, 1965. The license of the partnership under the Act terminated automatically upon approval of the plan. 7 U.S.C. 499d(a). (Pet. App. 16–17.)

In a subsequent administrative proceeding conducted pursuant to the Commodities Act, the Secretary of Agriculture, through the Department's judicial officer, concluded that the partnership had violated Section 2 of the Act, 7 U.S.C. 499b(4), by repeatedly failing to make payment promptly to certain of its creditors (Pet. App. 14). On judicial review at the behest of petitioners,[1] the Court of Ap-

[1] Review was sought by the individual petitioners as persons "responsibly connected" with the partnership as well as by the partnership itself because the effect of the Secretary's order declaring the partnership to have been in violation of the Act is to prevent any licensee under the Act from employing the individual petitioners for a minimum of one year. 7 U.S.C. 499h(b).

peals for the Second Circuit affirmed the Secretary's order, holding that (1) the 295 violations were "repeated" within the meaning of Section 8(b) of the Commodities Act; (2) Section 17 of the Bankruptcy Act did not preclude action by the Secretary against petitioners under the Commodities Act; and (3) Section 8(b) was not contrary to the due process clause of the Fifth Amendment, the prohibition against cruel and unusual punishment of the Eighth Amendment or the prohibition against bills of attainder in Article I, Section 9 of the Constitution.

ARGUMENT

1. The court of appeals correctly rejected petitioners' contention that the Secretary of Agriculture's action under the Commodities Act in temporarily barring petitioners from employment by licensees under the Act was repugnant to Section 17 of the Bankruptcy Act. The Commodities Act was enacted in 1930 to protect the producers of perishable agricultural products, who for the most part must entrust their products to distant buyers or commission merchants and depend for their payment upon the buyers' or merchants' fair dealing. H. Rep. No. 1196, 84th Cong., 1st Sess., p. 2. Thus, Section 2, as amended, 7 U.S.C. 499b, outlaws, *inter alia,* the merchant's failure to account and make full payment promptly to the fruit and vegetable grower. The imposition of the disciplinary sanctions of Section 8(b), including the temporary barring of employment in the perishable commodities industry, clearly furthers the Act's design of providing a "measure of control"

over the "many opportunities for sharp practice and irresponsible business conduct" in the perishable fruit and vegetable industry (Pet. App. 20).

The Bankruptcy Act is designed to relieve honest debtors of liability for past financial obligations (*Williams* v. *United States Fidelity & Guaranty Co.*, 236 U.S. 549, 554–555), not to excuse violations of governmental regulatory programs designed to protect the public welfare (see *Kesler* v. *Department of Public Safety*, 369 U.S. 153; *Reitz* v. *Mealey*, 314 U.S. 33; *Tracy* v. *Contractors' State License Bd.*, 63 Cal. 2d 598, 407 P. 2d 865). Nothing in the Act indicates a purpose to exempt bankrupts from the employment restriction provisions of the Commodities Act, and "such an exemption would be extremely damaging to the goal of the Commodities Act that only financially responsible persons should be engaged in the business subject to the Act." (Pet App. 21–22).[2]

2. Petitioners' constitutional claims (Pet. 8–12) are likewise without merit. The operation of Section 8(b) of the Commodities Act in temporarily barring the individual petitioners from employment in the fruit and vegetable industry does not conflict with the Fifth Amendment's guarantee of due process. The short-term employment bar is reasonably directed to

[2] Petitioners' theory is anomalous. Under it, if a licensee violates the Act by failing to make full payment *promptly*, just like petitioners' partnership, but eventually pays its shippers and producers, it faces an enforcement action by the Secretary, while the licensee who does not pay at all and is subsequently discharged in bankruptcy is immune from such action and persons responsibly connected with the bankrupt immune from any sanctions under the Commodities Act.

the accomplishment of the legitimate legislative purpose of preventing unsound and unstable economic conditions in an important interstate industry. See *Carolene Products Co.* v. *United States*, 323 U.S. 18, 31–32; *Nebbia* v. *New York*, 291 U.S. 502, 527–528; *Birkenfield* v. *United States*, 369 F. 2d 491, 494 (C.A. 3).

Nor does Section 8(b) operate as a bill of attainder, *i.e.*, a legislative act which denominates persons or associations, either by name or description, for punishment for past conduct without administrative or judicial hearing. *Communist Party* v. *SACB*, 367 U.S. 1, 86–87; *United States* v. *Brown*, 381 U.S. 437, 449–461. Section 8(b) does not single out persons or groups of persons for punishment for past conduct, but merely bars temporarily from employment in one industry any person responsibly connected with licensees in that industry who is found in an administrative proceeding subject to judicial review to have committed any flagrant or repeated violation of Section 2 of the Act.

Finally, Section 8(b) does not violate the Eighth Amendment's proscription against the imposition of cruel and unusual punishment. That proscription relates to sanctions penal in nature. See *Trop* v. *Dulles*, 356 U.S. 86, 93–104. It does not extend to the purely civil sanction involved here. As the court of appeals rightly observed (Pet. App. 26), one who is barred from employment "in one limited industry for a period of one or two years cannot be considered to have been cruelly or unusually punished." See *Pierce* v. *SEC*, 239 F. 2d 160, 163 (C.A. 9).

3. Petitioners' remaining contention is that the partnership's violations of Section 2 of the Commodities Act were not repeated or flagrant. Clearly, however, 295 violations of one Act over a period of several months constitute "repeated" violations of that act. Furthermore, the "flagrant" character of these violations seems clear from petitioners' willingness to accept perishable commodities from unsuspecting shippers and growers at a time when petitioners must have known that prompt payment, as required by Section 2 of the Act, could not be made by the partnership.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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